Public Knowledge

December 8, 2011

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

RE: Notice of *Ex Parte* presentation in: WB docket Nos. 08-94, 08-95, 11-18
RM-11498

Dear Ms. Dortch:

On December 7, 2011, Harold Feld, Legal Director, Public Knowledge (PK), met with Renata Hesse and Rick Kaplan with regard to the above captioned proceeding. Mr. Feld had a substantially similar conversation with Louis Peraertz, advisor to Commissioner Clyburn.

The Spectrum Screen Is Squarely Before The Commission In This Proceeding

PK, with other public interest groups, filed a timely Petition to Deny which extensively discussed the question of spectrum aggregation and the spectrum cap.[1] In particular, the Petition To Deny was at pains to point out that two Petitions for Reconsideration with regard to the current spectrum screen remained outstanding, as did a separate Petition for Rulemaking filed by others.[2] Accordingly, as stated in the Petition, "The Commission should not allow Applicants to rely solely on compliance with a spectrum screen of unsettled legal status."[3] Further, as PK noted in the *Petition to Deny*, AT&T itself raised the issue of the spectrum screen and sought further, beneficial modification.[4]

Applicants have therefore known since the proceeding began that the spectrum screen was "in play." Indeed, Applicants themselves introduced the issue. Applicants cannot credibly profess surprise or procedural unfairness at this late date when the spectrum screen was raised in the initial pleadings.

The Commission Should Grant PK's Petition for Reconsideration On The Spectrum Screen, Which Has Been Pending For Three Years.

As part of the Public Interest Spectrum Coalition (PISC), PK filed timely Petitions for Reconsideration following the Commission's adoption of the expanded spectrum screen in

[1] Petition to Deny of Free Press, Public Knowledge, Media Access Project, Consumers Union, and the Open Technology Initiative of the New America Foundation, WB Docket No. 11-18 (filed March 11, 2011) at 9-12.
[2] *Id.* at 10 n.28.
[3] *Id.* at 10.
[4] *Id.* at n.29 (citing Application Exhbit I at 21-25).

1818 N St., NW
Suite 410
Washington, DC 20036

T 202.861.0020
F 202.861.0010
publicknowledge.org

2008.[5] AT&T was not merely aware of these Petitions, but filed an opposition on this very issue.[6] Nothing prevents the Commission from granting these *Petitions*, in whole or in part, prior to its vote on the pending Application to transfer licenses from AT&T and Qualcomm. Indeed, PK urged Commission staff to grant the pending Petitions as a matter of basic fairness given the fact that the Petition will be pending almost exactly ***three years to the day*** since filed by PISC.

Applying a revised spectrum screen to the pending transaction (and, had it not withdrawn its application, in the AT&T/T-Mobile transfer) creates no unfairness to Applicants. As noted above, AT&T was fully aware of the pending Petitions, participated in that proceedings, and was reminded of the pending Petitions and the unsettled state of the spectrum screen explicitly in PK's Petition to Deny in this proceeding.

PK also noted that, since adoption of the "spectrum screen" in place of the spectrum cap, the Commission has ***always*** modified the spectrum screen in the context of license transfers in exactly this manner. Indeed, AT&T itself has been the beneficiary of just such an adjustment,[7] and has vigorously and repeatedly defended the Commission's authority to behave in precisely the way it has behaved here.[8] Nor is there anything unusual in the Commission adopting an alteration of the screen in one transaction and applying the rule to another transaction considered at the same time. The Commission did precisely this in 2008 when adopted modifications to the spectrum screen to permit the Verizon/Alltel transaction, to the detriment of the pending Sprint/Clearwire transaction. As AT&T subsequently applauded this conduct by the Commission,[9] it has no credibility in seeking to make an issue of this now.

Finally, PK noted that the spectrum screen is not a rule and does not require any notice and comment. It is a non-binding policy that provides guidance as to how Commission staff will review license transfers. As AT&T itself so eloquently explained:

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[5] *See* Sprint Nextel Corp. and Clearwire Corp. Application for Consent to Transfer Control of Licenses and Authorizations, WB Docket No. 08-94, Petition for Reconsideration of Public Interest Spectrum Coalition (filed December 8, 2008); Application of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and *De Facto* Transfer Lease Arrangements, WB Docket No. 08-95, Petition for Reconsideration of Public Interest Spectrum Coalition, (filed December 10, 2008).

[6] *See* Partial Opposition of AT&T to Public Interest Spectrum Coalition Petition for Reconsideration, WB Docket No. 08-94 (filed December 18, 2008);

[7] Applications of AT&T Inc. and Dobson Communications Corporation For Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 07-153, Memorandum Opinion and Order, 22 FCC Red 20295 (2007).

[8] *See, e.g.,* Opposition of AT&T Inc., to Petition for Clarification of Frontline Wireless, LLC WT Docket No. 07-153 (filed December 31, 2007). *See also* Petition to Deny of AT&T, WT Docket No. 08-94 (requesting Commission alter spectrum screen expressly to prohibit Sprint/Clearwire license application).

[9] Application for Merger of AT&T and Centennial Communications Corp., WT Docket No. 08-246 at 26 n.131 (defending FCC alteration of spectrum screen).

> [T]he Commission's definition of the spectrum input market for purposes of the initial spectrum screen is not a 'rule' subject to the APA 'notice and comment' procedures. Rather, the Commission's screen is simply one analytical tool used by the Commission to evaluate the competitive effects of an application proposing a merger of regulated carriers. . . . . It is well established that administrative agencies have the right to develop decisional standards in adjudicatory proceedings on a case-by-case basis, and a case-by-case approach is particularly appropriate in merger proceedings given the fact-intensive nature of the competitive analysis required.[10]

PK noted that, if the Commission considered it necessary to take further public comment on this issue despite the clear record in this case, PK would not object to the Commission holding the AT&T/Qualcomm transaction in abeyance pending a further public notice on the spectrum screen.

Also, with respect to any concern for procedural unfairness in AT&T/T-Mobile, PK invites AT&T to resubmit its application for reevaluation under the old screen. Given the thoroughness with which Commission staff demonstrated the utter lack of a factual basis for AT&T's claimed public interest benefits – on the basis, among other things, of AT&T's own internal documents – the question of whether AT&T triggered the spectrum screen in 272 markets, as is the case under the modified screen proposed in the pending order, or if the proposed license transfer triggered secondary review in "only" 190 markets under the old screen is rather irrelevant to the outcome.

Interoperability Condition As Interference Mitigation/ "Insurance"

PK continues to oppose the proposed transfer of licenses from AT&T to Qualcomm. However, as noted in the Petition To Deny, grant of the transfer should include an interoperability requirement. Recent filings by Vulcan Wireless and C. Spire demonstrate the need to include this interoperability requirement to mitigate the enhanced interference risk to A Block licensees based on AT&T's proposed use of the Qualcomm spectrum post-merger.

According to the information submitted by both parties, based on an independent report from Alcatel-Lucent and a proposal from Ericsson at a recent 3GPP meeting, adoption of the protocol to enable Qualcomm spectrum to operate as a downlink for mobile data will substantially increase interference risk to all holders of "Band Class 12" licenses, including the Lower A block licenses held by Vulcan, C. Spire, and others. This will occur even if AT&T operates within the power limits currently authorized by the Commission. As a result, Ericsson proposes that Lower A Block licensees, including licensees other than AT&T, should create an internalized guard band to avoid interference.

In other words, independent manufacturers predict that even if AT&T operates its system in accordance with Commission rules, this will cause interference to competing licensees also operating in accordance with Commission rules. The likelihood of such interference is, according

[10] Opposition to Frontline Petition for Clarification, WT Docket No. 07-153.

to the equipment manufacturers, so high that they have proposed an equipment design that would significantly curtail lawful use of the spectrum by A Block licensees. This includes not merely AT&T, but other licensees who do not benefit from the use of Qualcomm spectrum as downlink spectrum.

It cannot be disputed that resolution of potential interference among licensees lies at the core of the Commission's purpose. The obligation to manage harmful interference among competing licensees predates the current Commission, having its origins in the predecessor Federal Radio Commission. Nor can it be disputed that the increased interference risk is "merger specific." It is ***precisely*** because of AT&T's proposed new use of the spectrum that the enhanced interference risk will occur.

It would be the height of irresponsibility for the Commission to permit the transaction knowing that independent equipment manufacturers have found that the proposed use of the spectrum by AT&T will create significant risk of interference to the operations of other licensees. The Commission's experience with past interference conflicts that resulted in the 800 MHz rebanding order, and the current interference concerns arising in the context of Lightsquared's use of the spectrum in accordance with Commission rules, under scores how costly and detrimental such conflicts can be.

It must be stressed that the interference would arise from AT&T's ***lawful*** use of the spectrum. At is in precisely this situation, two primary users lawfully using spectrum in accordance with the rules, yet still interfering with one another, that create the most debilitating and prolonged interference fights. This is particularly difficult where, as here, AT&T will have enhanced access to equipment due to its size and greater capitalization. AT&T will therefore be in the position to define the spectrum environment unilaterally, forcing its competitors to either endure interference or engage in protracted proceedings at the Commission.

In addition to the other public interest benefits identified by PK and others, an interoperability condition would provide necessary insurance against this heightened interference risk. A Block licensees could deploy networks confident that, in the event of interference, they could roam on comparable 700 MHz bands that will not be impacted by AT&T's use of the Qualcomm spectrum. In fact, AT&T itself may benefit. As AT&T pointed out repeatedly in the T-Mobile proceeding, it is a purchaser of roaming as well as a provider. If the lawful, authorized operation of an A Block licensee creates interference with AT&T's use of the Qualcomm spectrum, AT&T will have the ability to roam on the other operators spectrum to replace lost capacity.

In accordance with the FCC's *ex parte* rules, this document is being electronically filed in the above-referenced dockets today.

Sincerely,

_____/s/_____
Harold Feld
Legal Director
Public Knowledge

CC: Renata Hesse
Rick Kaplan
Louis Peraertz